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339186—55——1

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 656

CITY OF HASTINGS, NEBRASKA, PETITIONER

v.

FEDERAL POWER COMMISSION AND KANSAS-NEBRASKA NATURAL GAS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinions in the Federal Power Commission (Pet. App. 34–53) are reported at 98 P. U. R. (N. S.) 1. The opinions in the Court of Appeals (Pet. App. 11–33) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1954. The petition for a writ of certiorari was filed on March 15, 1955. The jurisdiction of this Court is invoked under

28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act.

QUESTION PRESENTED

Whether the court below correctly affirmed the Federal Power Commission's finding that, on the facts of record, it was without jurisdiction over a separately identifiable sale of that part of a commingled mass of natural gas which was sold directly for industrial consumption.

STATUTE INVOLVED

Section 1 (b) of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717, reads as follows:

> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT

Petitioner here, the City of Hastings, Nebraska, seeks review of a judgment of the Court of Appeals that affirmed a Federal Power Commission

order dismissing, for lack of jurisdiction, its complaint against Kansas-Nebraska Natural Gas Company, "a natural-gas company" under the Natural Gas Act. The pertinent facts may be summarized as follows:

The Power Plant Contract. For many years petitioner has owned and operated in the City of Hastings, through its Board of Public Works and its Water and Light Department, an electric power generating plant (R. 131–2). Until April 11, 1942, that power plant used coal and oil as boiler fuel, but on that date the City and the Company executed a contract for direct sale of natural gas to the generating plant on an interruptible basis (R. 71–6, 132).[1] Because the Company had no lines inside the City (R. 18), the contract provided that the gas be delivered to the City at a town border station[2] but that the gas be measured at the power plant by means of a metering and regulating station to be installed and maintained by the Company (R. 74). This contract was superseded by later contracts executed on July 1, 1945 (R. 76–80), and on June 18, 1948 (R. 25–38), but insofar as is here pertinent, all of these power plant contracts were identical. Meanwhile, pursuant to negotiations between the

[1] When gas is supplied on an "interruptible basis" the natural gas company has the absolute right to interrupt the supply of natural gas whenever the needs of its "firm" customers so require.

[2] Since this contract was executed other town border stations have been added (R. 15, 19).

City and the Company, a transportation contract was executed on April 12, 1948, providing that, effective from October 1, 1947, the Company was to pay to the City ¾ cents per MCF for transportation of gas sold to the City and carried through the City's lines from the town border station to the generating plant (R. 85–7).

The Resale Contract. Before the City began buying gas for its power plant, the Company had already been selling gas, pursuant to a commodity type town-borders contract[3] dated September 27, 1941, to the Hastings Gas Company, a privately owned utility, for resale and distribution to local consumers (R. 88–91). This 1941 contract contained a provision that:

> Gas used or consumed by Buyer for industrial use shall not be covered by the foregoing schedule but shall be covered by separate agreement [R. 90].

In April, 1942, the City bought the distribution system of the Hastings Gas Company, and on April 13, 1942, took an assignment of the 1941 town border contract (R. 91–2). The City con-

[3] A commodity type rate is based solely on the quantity of gas actually consumed by the purchaser. It differs from a contract demand schedule where the rate is made up of two elements, (1) a commodity charge for the gas actually consumed and (2) a demand charge based on a percentage of the purchaser's peak demand. The demand charge is a fixed amount regardless of the amount of gas actually purchased; it is predicated on the theory that the purchaser should pay for the cost and upkeep of the equipment necessarily maintained by the supplier to meet the purchaser's needs.

tinued to purchase gas from the Company under that 1941 contract until October 1, 1947, when, following a rate survey inaugurated by the Company for reducing its rates, the Company filed with the Commission Rate Schedule G–1, based upon a contract demand rate as well as a reduced commodity rate (R. 93–116). After some dispute over the new contract demand rate, petitioner finally agreed to execute a new town border contract on April 12, 1948, effective October 1, 1947, incorporating the terms of Rate Schedule G–1 (R. 117–122). The new rate schedule contained the following limitation, "This rate schedule * * * shall not apply to gas used or consumed by Utility (or any of its Departments) for industrial purposes" (R. 97).

The Current Dispute. On August 25, 1949, the City undertook to cancel, effective December 1, 1949, its June, 1948, power plant contract (*supra,* p. 3) under a clause of that contract authorizing cancellation by the Buyer upon 90 days' notice if increased costs to the Company should raise the rate above the cost to Buyer of other fuels available (R. 32, 39). The Company disputed the City's authority to cancel (R. 40),[4] but on December 1, 1949, the City's Gas Depart-

[4] The Company contended that no other fuel was available at a lower cost. This contention was upheld by the United States District Court for the District of Nebraska in contract litigation brought by the Company against the City. That case is now on appeal. See fn. 8, p. 10, *infra.*

ment contracted with the Water and Light Department to supply its needs for natural gas as boiler fuel on an interruptible basis out of the gas secured from the Company under the resale contract of April 12, 1948 (R. 42–4). The Company has consistently disputed the City's right to do this because of the exclusionary clause of Rate Schedule G–1 (R. 97), but the City has nevertheless continued to use gas for its power plant and has contended that it could pay for this gas under the resale contract. On April 25, 1950, the City undertook again to cancel, effective July 1, 1950, the power plant contract (R. 81–3) pursuant to another cancellation provision of the contract (R. 37). This was done to insure cancellation should the earlier action be found to have been ineffective. The Company wrote to the City on June 7, 1950, advising that should the City use gas for the power plant after July 1 without an effective contract, the Company would hold it accountable under the terms of the cancelled 1948 contract (R. 84–5).

On September 20, 1950, the City filed a complaint with the Federal Power Commission requesting the Commission to assert jurisdiction over gas sold to the City for the power plant, to approve Rate Schedule G–1 as the proper rate for such sale and to strike the exclusionary clause of Rate Schedule G–1, excluding gas sold for industrial purposes from its coverage (R. 122–128). On October 30, 1950, the Company moved

to dismiss the complaint on the ground that the Commission lacked jurisdiction (R. 130). After oral argument on this issue, the Commission decided that it needed additional facts and therefore ordered full hearings which were held on May 28 and 29, 1952 (R. 131). On February 5, 1953, the Commission, with one dissent, rendered its decision dismissing the complaint for lack of jurisdiction on the ground that the sale of gas for power plant use was an identifiable transaction separate and independent from the sale of gas for resale and therefore a direct sale for consumptive use beyond the Commission's regulatory jurisdiction (R. 129–146; Pet. App. 34–53).[2] On the City's petition for review, the court below, one judge dissenting, affirmed the Commission's action (Pet. App. 11–33).

ARGUMENT

Petitioner in this case seeks further review of the Commission's holding that since the sales of gas to petitioner for its power plant constituted an identifiable transaction, separate and distinct from the sales to petitioner for resale,

[2] The Commission's order is not clear as to whether the complaint was dismissed because the Commission believed it had no jurisdiction to consider the complaint, or whether, having considered it, the Commission decided that it had no jurisdiction to grant the relief requested. The latter seems the more likely basis since a full hearing on the merits was held. However, the difference seems unimportant for purposes of decision of this case.

the power plant gas sales are beyond its regulatory authority. The court below properly affirmed the Commission's action, which is supported by substantial evidence and is fully consistent with the relevant decisions. Accordingly, there is no need for review by this Court.

1. (a) The record evidence clearly supports the Commission's finding that the history of separate rates, negotiations, contracts, etc. made the two sales separate and distinct so "that the parties had effectively established separate rates for separate sales under two separate contracts" (R. 135, Pet. App. 41). The City does not deny that since April 1942, when the Company began selling gas to the City for use in its power plant, and until July 1, 1950 (or December 1, 1949),[6] when the City cancelled its power plant contract, separate negotiations, contracts and rates have existed for the sale of power plant gas fuel and for the sale of gas for resale to local consumers. Nor does it dispute that, between April 1942 and the date on which the power plant contract was cancelled, only the gas sold to it by Kansas-Nebraska for local resale was subject to Commission regulation and that the Natural Gas Act required the filing of only the rate schedule applicable to that sale. Finally, it is conceded that since commencement of the sale of gas to the

[6] Whether that contract was cancelled on December 1, 1949, as the City contends or on July 1, 1950, as the Company contends is immaterial. See *infra*, p. 10, fn. 8.

power plant the volume of gas so used has been accurately measured and recorded separately from the gas used for resale. It is thus plain that, until a few months before the institution of the present proceeding in September, 1950, the sale of power plant gas was separate and distinct from the resale sales.

(b) Petitioner contended below, and the dissenting circuit judge agreed, that despite this earlier separation of the two sales the City's unilateral cancellation of its power plant contract did away with the two separate transactions so that only one contract has existed since that time. Thus, the City argued that when this action was commenced all gas purchased from the Company was under the resale rate schedule and that the City was therefore free to use the gas thus obtained for its power plant.

This argument, however, of necessity, disregards the express limitation of the resale rate schedule to the effect (R. 97):

> This rate schedule shall apply separately to all natural gas delivered by the Company to the Utility * * * for resale * * * *but shall not apply to gas used or consumed by Utility (or any of its Departments) for industrial purposes.* [Italics supplied.][7]

[7] This clause, or one substantially similar, has appeared in all of the City's resale contracts with the Company since April 1942, when they first began doing business with each other.

Plainly, since the gas used in the City's power plant is "used * * * by Utility * * * for industrial purposes," the sale of this gas cannot be subsumed under the resale rate schedule unless, of course, the Company consents thereto. And it is clear that the Company has not so consented. The Company has repeatedly warned the City that any gas used in its power plant could not be paid for under the resale rate schedule, and upon the City's refusal to heed these warnings, the Company instituted litigation to recover for the gas so used on a contractual or quasi-contractual basis. *Kansas-Nebraska Natural Gas Co.* v. *City of Hastings*, D. Neb., Civil Nos. 255, 273.[8] Indeed, the City itself has recognized the continuing force of the exclusion; the very purpose of this proceeding is to obtain Commission assistance in its removal so that the City can use the gas obtained under the resale rate schedule for its power plant. Since the sales of gas for the two different purposes are thus still distinct, separate and independent even after the City's cancellation of the power plant contract, the dis-

[8] On March 8, 1954, after lengthy litigation, the United States District Court for the District of Nebraska found that an implied contract exists in fact between the City and the Company for the power plant gas and has existed since July 1, 1950, when the City cancelled its written contract. The court therefore awarded to the Company damages equal to the value of all gas consumed by the City in its power plant, since July 1, 1950, according to the rate specified in the power plant contract. See *supra*, p. 5, fn. 4; p. 8, fn. 6.

senting judge clearly erred in concluding that "the gas used by the City as fuel in the generating plant * * * is part of a larger quantity nominated by the City for resale" (Pet. App. 31). As stated by the court below, "the exact amount of gas consumed by the power plant is, and throughout the entire history of the dealings between the parties, has been measurable" (Pet. App. 25).

2. The sale of gas for the power plant, being clearly identifiable as an essentially separate and independent transaction from the sale of gas for resale, clearly is not subject to Commission regulations under the Natural Gas Act. Section 1 (b) of the Act, *supra*, p. 2, not only provides for Commission jurisdiction over "the sale in interstate commerce of natural gas for resale," but expressly denies Commission authority over "any other transportation or sale." See, e. g., *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 516–517. Consequently, there can be no doubt that direct sales for consumptive use, as is here involved in the sale of gas for power plant use, are excluded from commission jurisdiction and designedly were left to state regulation. *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329, 334.

(a) Despite the clear distinction drawn by the Act between sales for resale and sales for con-

sumptive use,[9] the City nevertheless complains that the Commission should regulate, and establish the rate for, the Company's sale of gas for use in the city-owned-and-operated power plant. If, in the circumstances of this case, this gas had been supplied through a separate "lateral" line leading directly from the Company's main to the power plant, rather than mingled with the other gas, there would be no question that the power plant gas would not have been sold "for resale," that the sale would not have been within the Commission's jurisdiction, and, consequently, that dismissal of the complaint was correct. But the City contends that since the power plant gas arrives at its town border mingled with other gas to be resold to local customers, the result must be different and the Commission has jurisdiction over this power plant gas.[10]

The City's position might have some merit were the commingling of gas complete in all aspects,

[9] In view of this express Congressional mandate, there is no substance to the complaint made by the City and the dissenting Commissioner that the Commission should assert jurisdiction here since, should the City sell the power plant to a third person and thereafter undertake to furnish the needed gas, the Company's sale of such gas to the City would be subject to Commission regulation as a sale for resale.

[10] The only reason why the gas was delivered in a commingled mass was to avoid the economic waste involved in setting up two separate pipelines, one for the power plant gas and one for the resale gas. In this connection, it is noteworthy that the Company has agreed to pay, and has paid, the City ¾ cents per MCF for the use of the City's lines to transport the gas destined for the power plant.

physically, contractually, as well as historically, and indeed this Court has so suggested in a somewhat similar case under the Federal Power Act. In *United States* v. *Public Utilities Commission of California,* 345 U. S. 295, 316–8, this Court referring to the Commission's opinion in the instant case, stated that jurisdiction might turn on "whether an essentially separate transaction covering the power directly consumed by the purchaser is identifiable," i. e., not merely that the amount used for such purpose can be ascertained but that there be "record evidence of separate rates, separate negotiations, separate contracts or separate rate regulation by official bodies, in short that the 'sales' themselves were separate" (345 U. S. at 318). In the *Public Utilities* case there was no such record evidence; however, here the record leaves no doubt as to the presence of the various elements demonstrating the existence of a separate identifiable transaction. See *supra,* pp. 3–5, 8–9.

Nor is the City's position that mere physical commingling of resale gas with the power plant gas automatically gives the Commission jurisdiction over the sale of the entire mass aided in any way by *State Corporation Commission of Kansas* v. *Federal Power Commission,* 206 F. 2d 690 (C. A. 8), certiorari denied, 346 U. S. 922, and *California Electric Power Co.* v. *Federal Power Commission,* 199 F. 2d 206 (C. A. 9), certiorari denied, 345 U. S. 934, on which the City

relied below. While the Court of Appeals in each case held that the Commission had jurisdiction over the entire commingled sale of natural gas or electric energy, though some was sold for resale and some for direct consumptive use, it is significant that in neither case was there a showing of a factually separate transaction such as we have here. Thus, in the *State Corporation* case, the Eighth Circuit, after pointing to the lack, historically, of separate contracts and to the interdependence of the rate schedules for the allegedly separate contracts, expressly distinguished the instant case on the ground that here, unlike the *State Corporation* case, there was a completely separate identifiable transaction (206 F. 2d at 701):

> But in that case [*City of Hastings* v. *Kansas-Nebraska Co.*, FPC opinion No. 244, Feb. 5, 1953] it was expressly found by the Commission that there was a long subsisting contract between the natural gas company involved and the City of Hastings by the terms of which the gas company sold the City the interruptible supply of gas it used itself in the power plant by direct sale to the City for that use. * * *
>
> But in the case at bar, Northern's contracts with its utility customers are like the town border contracts in the *City of Hastings* case. * * *

Moreover, it is noteworthy that the decisions of all these cases are based on practical and

administrative difficulties involved in differentiating between the two uses for jurisdictional purposes, where in fact the two are at most only incompletely separated. In the *Public Utilities* case, this Court in discussing *Penn. Water* v. *Federal Power Commission,* 343 U. S. 414, noted (345 U. S. at 317):

> The impossibility of separating interstate from intrastate electricity consumed by each purchaser is patent. In such a case, federal rate jurisdiction must attach to each distributor's negotiated agreement with the seller irrespective of occasional and unpredictable use of non-jurisdictional instrastate power.

Similarly, in the *California Electric* case, the Ninth Circuit commented (199 F. 2d at 209):

> * * * the supposed non-jurisdictional part of the energy is indistinguishable at the point of sale from the remainder. * * * The Commission contends that it is not practicable to segregate the jurisdictional from the alleged nonjurisdictional part. * * *

Thus, where the two uses are not identifiable into separate and independent transactions, the needs of effective regulation require that they be treated as a unit, subject to Commission regulation as sales for resale. However, where as here, the two are separate and distinct, such practical considerations are absent and, accordingly,

there is no occasion for the Commission to regulate a sale otherwise excluded from its authority.[11]

(b) Relying on *Colorado Interstate Gas Co.*, 8 F. P. C. 313, the City has also urged that the Commission's reference to the history of separate transactions improperly emphasizes the "end-use" of the gas sold and ignores the true nature of the gas when delivered to the City. But Section 1 (b) of the Gas Act, *supra.* p. 2, by limiting the Commission's jurisdiction to sales of natural gas for resale, imposes a duty upon the Commission to inquire into the intended end use of the gas. Only by determining the purpose for which the gas is to be used can the Commission ascer-

[11] Such has been the Commission's consistent view. In its brief filed in 1950 in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 185 F. 2d 357 (C. A. 3), the Commission stated (at pp. 30–31):

"It is apparent that the Commission has consistently refrained from asserting jurisdiction over sales for power plant use where the sales are made under separate contracts.

* * * * *

"The pattern is therefore clear. The Commission, in keeping with the foregoing legislative history, has consistently asserted jurisdiction over the entire sales of gas to wholesale purchasers even when a portion of the gas is used in the purchasers' own power plants, if the sale is made under single contracts and tariffs on file with the Commission and the deliveries are made in bulk without physical separation of volumes going to the plants. And the Commission has not asserted jurisdiction over sales for boiler plants when such sales are made under separate contractual agreements and no tariffs have been filed with the Commission covering them even though the deliveries are made in bulk at one metering point."

tain whether it has jurisdiction over a particular sale.

Moreover, the City's argument is predicated on a misapplication of the *Colorado Interstate* case. In that case, where the natural gas company sought to insert into its resale rate schedule a proviso prohibiting the use for the purchaser's power plant of the gas sold for resale, the Commission refused to permit the addition of the proviso. But in that instance, unlike this one, there had been no prior history of separate transactions, and, indeed, until the company proposed the proviso it had sold the gas to the purchaser in a single commingled mass without any effort to differentiate among end uses. Since the situation in *Colorado Interstate* was thus different from that of the instant case, the Commission's ruling has no application here. Moreover, it is significant that this ruling by the Commission was reversed on appeal. *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 185 F. 2d 357 (C. A. 3).[12]

[12] The third Circuit's holding, that the Commission could not forbid a gas company from including in its resale rate schedule a proviso similar to that here involved, makes it doubtful whether, even if the Commission had jurisdiction, it could grant the relief requested by the City, i. e., that it direct the deletion of the proviso, particularly since the Commission has found the proviso not to be discriminatory (R. 136; Pet. App. p. 42).

CONCLUSION

The Commission's order is supported by substantial evidence and is in accord with the relevant decisions. There is no conflict of decisions, and no need for further review. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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